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By. of Counsel for Motion for Pet'r.

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Filed April 8, 1901.

IN THE

Supreme Court of the United States of America.

——— TERM, 1901.

JOHN FRANCIS, ANTHONY HOFF and JOHN EDGAR,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.
} Criminal.

Petition for a writ of *certiorari*, requiring the Circuit Court of Appeals for the Sixth Circuit, to certify to the Supreme Court, for its review and determination, the case of John Francis, Anthony Hoff and John Edgar, Appellants, against the United States of America, Respondent.

MILLER OUTCALT,
THOS. F. SHAY.
Attorneys for Petitioners.

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To the Honorable, the Supreme Court of the United States:

The petition of John Francis, Anthony Hoff and John Edgar, respectfully shows to this Honorable Court as follows:

First. That on the 6th day of October, A. D. 1899, a certain bill of indictment was returned and presented by the grand jurors of the United States of America, within and for the Southern District of Ohio, against the petitioners, as appears more fully in the certified copy filed herewith as Exhibit "A", and which said indictment was endorsed on the cover,—"Indictment for Conspiracy. Sec, 5440. Am. 1st Supp. 264. Act Mar. 2, 1895. 2 Supp. 435. A True Bill. J. M. Robinson, Foreman of the Grand Jury."

Second. That thereafter in said District Court, said petitioners severally filed their certain *motions to quash* said bill of indictment, for the reasons and upon the grounds more fully set forth in said motions, as appears from the record filed herewith and marked Exhibit "A."

Third: That thereafter, upon consideration of said *motions to quash*, by said District Court, the same were overruled, to which ruling and judgment of said Court, the petitioners severally excepted. And thereupon said cause proceeded to trial, and such proceedings were thereupon had that at the conclusion of the evidence for the United States, plaintiff therein, each of said petitioners filed his *motion to direct the jury to acquit* him, which, on consideration by said Court, were overruled, and said petitioners duly excepted. And said cause being thereupon argued by counsel, and said jury being charged by the Court, the same was submitted to said jury, and resulted in a verdict of guilty, as to each of said petitioners, as appears from said record, Exhibit "A."

Fourth. That thereafter, and in due time, each of said petitioners filed his certain *motion in arrest of judgment*, for the reasons and upon the grounds as more fully appear from said record, marked Exhibit "A". And each of said petition-

ers also filed his certain motion for a new trial, for the reasons and upon the grounds as more fully appear from said record, marked Exhibit "A". All of which motions, were, on consideration by said Court, overruled, and judgment duly pronounced against each of said petitioners as appears of record. And to each and all of said rulings and judgments of said Court, said petitioners each severally excepted

Fifth. That thereafter, in due time, said petitioners presented to said Court their certain *bill of exceptions* which said Court finding to have been reasonably taken and observed, and the same being found by the Court to be a true bill of exceptions in all respects, the same was allowed, signed, sealed, and upon the motion of said petitioners, made a part of the record in this case.

Sixth. That thereafter, and in due time, there was filed in the clerk's office of said Court, a certain *petition for writ of error*, for and on behalf of said petitioners, together with an *assignment of errors*, all of which more fully appears in said record, marked Exhibit "A". And thereupon, on the same day, an entry was made upon the journal of said court, wherein and whereby "it being made to appear to the Court that the defendant (nameing them) have filed their petition for allowance of a writ of error and assignment of errors herein, and it being further made to appear to the Court that the said defendants intend to prosecute said writ of error," it was ordered that the said writ of error be, and the same thereby was allowed, and that the same operate as a supersedeas, upon the said defendants giving bonds with surety to the satisfaction of the clerk of this Court, which was accordingly done.

Seventh. That thereafter, in due time, and in accordance with the laws in such cases made and provided, and in strict

conformity with the rules and practice of said Courts, said petition for said writ of error and said assignments of error. were diligently prosecuted by said petitioners to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of manifest errors which said petitioners claimed had happened, to their great damage; and such proceedings were had in said cause in said Circuit Court of Appeals, that said petition for a writ of error and said assignments of error, were presented to said Court, and the same were argued and submitted to said Court on January 17, 1901, and the judgment of said Court prayed thereon.

Eighth. That thereafter, to-wit, on February 12, 1901, said cause was decided by said Circuit Court of Appeals, and by the consideration of said Court the judgment of said District Court was affirmed, as appears of record herein.

A certified copy of the entire record of the said cause in the Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals, and the same is marked Exhibit "A."

Your petitioner is advised and believes that the said judgment of the said Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes. Approved March 3, 1891." The said case being made final in the said Circuit Court of Appeals by the said act.

The said case was decided in the said Circuit Court of Appeals against your petitioners, when it should have been in their favor, because of manifest errors apparent upon the face of the record herein, and for the following manifold reasons, to-wit:

First. Because it is manifest from the record herein that said Circuit Court of Appeals erred in affirming the action of said District Court in overruling the several *motions to quash* said indictment filed by said petitioners, respectively, for the reasons therein stated, among others, namely:

(a) Because the same charges no offense against any valid law of the United States.

Second. Because said Circuit Court of Appeals erred in affirming the action of the said District Court in overruling the several *motions to acquit* filed by the petitioners, respectively, at the conclusion of the evidence offered by the Government, for the following reasons, to-wit:

(a) Because said indictment does not charge an offense within the jurisdiction of said Court.

(b) Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

(c) Because said act of March 2, 1895, is not a valid or constitutional act.

Third. Because said Circuit Court of Appeals erred in affirming the action of the said District Court in overruling the several *motions in arrest of judgment*, filed by the petitioners, respectively, for the reasons following, to-wit:

(a) Because said indictment does not charge an offense within the jurisdiction of this Court.

(b) Because the facts and statements contained in said indictment charge no crime against any valid law of the United States.

(c) Because said act of March 2, 1895, is unconstitutional and void.

ARGUMENT.

Your petitioners respectfully do represent and show to this Honorable Court that they were convicted at the February Term, 1900, of the District Court of the United States, within and for the Southern District of Ohio, Western Division, upon an indictment presented and returned in said Court, in which they were charged with violating Section 5540 of the Revised Statutes of the United States, which in terms makes it a crime to conspire to commit an offense against the United States.

The overt act which they were charged with having conspired to commit was the alleged causing to be carried from one state to another, to-wit, from Newport, Kentucky, to Cincinnati, Ohio, papers, certificates and instruments purporting to be and to represent; as they then and there well knew, tickets, chances, shares and interests in, and dependent upon the event of lottery and similar enterprises offering prizes dependent upon lot or chance.

Upon conviction sentences were pronounced against said petitioners, and thereafter said petitioners duly prosecuted error to the Circuit Court of Appeals for the Sixth Circuit, and upon submission of said cause and writ of errors to said Circuit Court of Appeals, the judgment of said District Court was affirmed.

The overt act charged as criminal was alleged to be such because it was a violation, as was charged, of the first section of the act of March 2, 1895, which is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so called gift concert or similar enterprise, offering prizes upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second offense by such imprisonment only."

The validity of the first section of the act just recited, was called in buestion during the trial by the several *motions to quash* and *motions to acquit*, and after verdict, by *motions in arrest of judgment*.

Proper exceptions to the rulings of the court thereon were duly taken and reserved, and were fully set forth and indicated in their certain bill of exceptions, and were distinctly and accurately noted and alleged in said *petition for a writ of error* and said *assignments of error*, and the question of the

validity of said Act of March 2, 1895, is again now respectfully presented and urged upon the consideration of this Honorable Court.

It is contended, in the first place, that the papers, certificates and instruments mentioned in the indictment herein as being carried by the persons named from Newport, Kentucky, to Cincinnati, Ohio, are not merchandise. Therefore the act in question is unconstitutional.

Second. The only possible claim by which the act in question could be held valid, is that it is a regulation of "commerce."

What is commerce? "It is an interchange or mutual change of goods, wares, productions or property of any kind between nations or individuals, either by barter or by purchase and sale, trade, traffic."

The design and object of the power embraced in Article 1, Sec. 8, of the Constitution of the United States was to establish a perfect equality among the several States as to commercial rights," etc.

While the largest lattitude may be given Congress to regulate the mail, excluding therefrom lottery matter of every kind, as this Court has said in the Jackson case (see Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S., 1),

> "Taking the term commerce in its broadest acceptation—supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted—can it properly be made to include objects and purposes such as those contempiated by the law under review?"

Veazie *v.* Moor, 14 How., 573.

Telegrams would become an instrumentality of commerce, but would lotteries? See,

Paul *v.* Virginia, 8 Wall., 168, 183.
Crandall *v.* Nevada, 6 Wall., 35.
Phila. Fire Ins. Co. *v.* New York, 119 U. S. 110.

"Every species of property which is the subject of commerce, or which is used or even essential to commerce, is not within the control of Congress."

U. S. *v.* Steffins, 100 U. S., 95.

The legislation of Congress as to trade marks is null and void for want of constitutional authority.

In Phila. Fire Ins. Co. *v.* New York, 119 U. S., 118, this Court decides that the issuance of a policy of insurance is not a transaction of commerce.

In Welton *v.* Missouri, 91 U. S., 280, the Court says:

> "Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, some subjects which are local in their operation. Further than this its power of prohibition can not extend."

To hold that Congress has the power to regulate or prohibit the carrying of tickets for a lottery on the ground that it is "commerce," is to recognize the fact that a lottery is a commercial transaction.

Gibbons *v.* Ogden, 9 Wheat., 1.
City of New York *v.* Mila. 11 Peters, 102.
Brown *v.* State of Maryland, 12 Wheat., 419.
License Cases, 5 How., 504.
Veazie *v.* Moor, 14 How., 573.

Commercial intercourse is an element of commerce which comes within the regulating power of Congress. It includes the means by which commerce is carried on (Hare on Com. Law, 479 and 1257), and includes as well instrumentalities of commerce. See,

Pensacola Co. *v.* Western Union Tel. Co., 96 U. S., 1.

It has been held that the states may provide regulations until Congress acts in reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive on all state authority.

And in the Trade Mark Cases, 100 U. S., 95, this Court says:

> "Every species of property which is the subject of commerce, or which is used or is even essential in commerce, is not brought by this cause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of Congressional legislation more than other property."

Nathan *v.* Louisiana, 8 How., 73.

In Paul *v.* Virginia, 8 Wall., 168, this Court held:

> "That a policy of insurance made by a corporation of one state on property situated in another, was not

an article of commerce, and did not come within the purview of the clause we are considering."

See "Commerce."

Veazie *v.* Moor, 14 How., middle p. 573.

It must be remembered that the act in 28 Statutes at Large 963, *supra*, is not an interstate commerce act nor an amendment thereto.

In Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. (*supra*) at page 9, the Court, through Chief Justice Waite, defines why a telegraph company may be considered within the power of Congress to regulate as commerce, to wit:

> "It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information. It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interests they have in charge. Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and intercommunition comes within the controlling power of Congress, certainly as against hostile State legislation."

We maintain, therefore, that it is not within the constitutional power of Congress to prevent the carrying from one State to another, except perhaps through the mails, papers instruments or certificates purporting to be a betting interest in a lottery.

Granting, for argument, that it could prevent the carriage through the mails of a newspaper from one State to another, which printed a lottery scheme by virtue of its exclusive power and control over the mails, but could it prohibit the carriage by other means of newspapers from one State to another giving the result of such lottery? As well might it be claimed that it would be within the power of Congress to prohibit the telephoning from Newport, Ky., to Cincinnati, Ohio, a play in a lottery to be drawn on some subsequent day.

If congress has no power to prohibit a person from memorizing the numbers drawn from a wheel and communicating them by word of mouth from one State to another, or if it is not within the power of Congress to prevent the transportation by other means than through the mails or newspapers published in one State to another, giving such information as a matter of news, how can it prevent the carrying from one State to another by means other than the mails? Where is the commerce which it seeks to regulate, even if a lottery could in any sense be considered a species of commerce?

Chief Justice Fuller, in the case of U. S. vs. Knight, 155 U. S. R., page 12, employs this language as a part of his opinion: "Commerce undoubtedly is traffic."

Said Chief Justice Marshal:

> "But it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is

regulated by prescribing rules for carrying on that intercourse. That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

And cites in support thereof:

Gibbons *v.* Ogden, 9 Wheat., 1, 189, 210.
Brown *v.* Maryland, 12 Wheat., 419, 448.
The License Cases, 5 How., 504, 599.
Mobile *v.* Kimball, 102 U. S., 691.
Bowman *v.* Chic. & N. W. Ry., 125 U. S., 465.
Leisy *v.* Hardin, 135 U. S.. 100.
In re Rahrer, 140 U. S., 545, 555.
See page 12, U. S. *v.* Knight, 155 U. S.

It is vital that the independence of the commercial power and the police power, and the delineation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnished the strongest kind of union, the other is essential to the preservation of the autonomy of the states, as required by a dual form of government; and acknowledged evils however grave and urgent they may appear to be, had better be borne than the risk to be run, in the effort to supress them of more serious consequences by resort to expedients of doubtful constitutionality.

The regulation of commerce applies to the subjects of commerce and not to matters of internal police.

See page 13, 155 U. S. *v.* Knight.
Paul *v.* Virginia, 8 Wall., 168.
Hooper *v.* California, 155 U. S., p. 648.
Phila. Ins. *v.* New York, 119 U. S., 110.

Wherefore you petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a a complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled John Frances, Anthony Hoff and John Edgar, Appellants, *v.* the United States of America, Respondent. Number 849. To the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes." Approved March 3, 1891. Or that you petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act; and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

MILLER OUTCALT,
THOS. F. SHAY.
Attorneys for Petitioners.

STATE OF OHIO, } ss.
HAMILTON COUNTY, }

John Frances, Anthony Hoff and John Edgar each being duly sworn according to law, severally depose and say that they are the petitioners in the above written petition, and

have read said petition and the same is true of their own knowledge, except such matters as are therein stated as information and belief, and as to such statements they believe the same to be true.

JOHN FRANCES.
ANTHONY HOFF.
JOHN EDGAR.

Subscribed and sworn to before me this 30th day of March, 1901.

CHAS. E. BEMISS,

Notary Public in and for said County and State.

No. 293. 80.

By. of Edmunds for Petitioners.

Office Supreme Court U.S.
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Supreme Court of the United States.

JOHN FRANCIS *et al.*

vs.

THE UNITED STATES.

October Term, 1901.
No. 293.

BRIEF ON THE CONSTITUTIONAL QUESTION INVOLVED, BY GEORGE F. EDMUNDS OF COUNSEL FOR THE PETITIONERS.

Statement.

This was a prosecution founded on section 5440 of the Revised Statutes, alleging a violation of the Act of March 2d, 1895, by the personal carriage by the petitioners, or some of them, of the lottery papers mentioned in the Act, from the State of Kentucky into the State of Ohio. The paper or papers carried were slips containing figures alleged to indicate numbers which might be drawn from the lottery wheel, and which numbers, if corresponding with the numbers on the paper, would entitle the person who wagered on those numbers to a prize. The petitioners were found guilty, and the case was carried from the District Court to the Circuit Court of Appeals, which affirmed the judgment. The point that the Act of Congress of March, 1895, was unconstitutional was made and insisted upon in the

trial court and in the Circuit Court of Appeals. It is now assigned for error (among many others not involving the constitutional question) that the court below held the Act of Congress in question, as applied to the case of the petitioners, to be valid.

The suggestions of the undersigned will be devoted exclusively to the constitutional question without prejudice to other important points presented in other briefs.

Section 5440 is as follows:—

> "SEC. 5440. If two or more persons conspire "either to commit any offense against the United "States, or to defraud the United States in any "manner or for any purpose, and one or more "of such parties do any act to effect the object "of the conspiracy, all the parties to such con- "spiracy shall be liable to a penalty of not less "than one thousand dollars and not more than "ten thousand dollars, and to imprisonment not "more than two years."

The Act of March, 1895, is as follows:—

> "CHAP. 191. An act for the suppression of "lottery traffic through national and interstate "commerce and the postal service subject to the "jurisdiction and laws of the United States.
>
> "Be it enacted by the Senate and House of "Representatives of the United States of Amer- "ica in Congress assembled: That any person "who shall cause to be brought within the "United States from abroad, for the purpose of "disposing of the same, or deposited in or car- "ried by the mails of the United States, or "carried from one State to another in the United

"States, any paper, certificate or instrument pur-
"porting to be or represent a ticket, chance,
"share or interest in or dependent upon the
"event of a lottery, so-called gift concert, or
"similar enterprise, offering prizes, dependent
"upon lot or chance, or shall cause any adver-
"tisement of such lottery, so-called gift concert
"or similar enterprise, offering prizes dependent
"upon lot or chance, to be brought into the
"United States, or deposited in or carried by
"the mails of the United States, or transferred
"from one State to another in the same, shall
"be punishable in the first offense by imprison-
"ment for not more than two years or by a
"fine of not more than one thousand dollars,
"or both, and in the second and after offenses
"by such imprisonment only."

Points.

1.—The passage of lottery tickets, either drawn or undrawn, from one State to another is not commerce. They are neither goods, wares, nor merchandise. They are the evidence of a chance to obtain a right to a sum of money, or, if the lottery has been drawn and the ticket has won a prize, the evidence of the right of any bearer to the prize. The Act does not prohibit them as such but only as possessing a quality which Congress thought injurious to the morals and the pockets of the citizens of the several States.

California taxed bills of lading as steps and symbols in the exercise of interstate trade in *things*, and this court held the taxation invalid as a *restriction* upon commerce; which was in precise and correct contrast with its decision in respect of interstate insurance. Setting aside the question of corporations of one State doing business in another without its consent, it is submitted that Congress cannot

lawfully *prohibit* an individual citizen of one State from insuring the house of, or doing any other kind of business with, a citizen of another, or the transmission, otherwise than in the mails, of the documents relating to the transaction, or even taxing the so doing otherwise than in common with all other such transactions in the United States and without regard to the fact that one party is in one State and the other in another State. A mere contract (certainly in respect of incorporeal and intangible matters), whether lawful or unlawful in the State or States in which the contract is made, will hardly be claimed by anybody to be commerce either State or interstate; and if this be true, it necessarily follows that the transmission of the paper evidences of the existence of such a contract cannot be commerce of any kind; and nobody has yet explained in what way such papers can be in any wise an interference with or restraint upon commerce.

The statute in question does not purport either in title or body to be a provision in respect of commerce. Its obvious and indisputable *motif* is "the suppression" of some particular forms of chance operations in the States, which Congress and some of the States, in their recent condition of temperament, thought to be injurious to good manners in the social progress of the people; a subject with which Congress plainly had no constitutional right to deal otherwise than as determining what class of matter might go through the post office or be carried in its own vessels or vehicles. This legislation began with the post office as purely and exclusively relating to the management of its own mail bags and offices, in respect of which it was manifestly and exclusively supreme. After a while it was thought that the reform by post office means was not rapid enough, and accordingly the law was enlarged to its present dimensions. If the clear prin-

ciples declared and implied in Barber *vs.* Minnesota (1136 U. S., 313,) are to be followed, it is demonstrated that the Act cannot stand as a lawful exercise of the power "to regulate commerce *among* the "several States."

If this attempt to deal with the social conduct and condition of the people of the States be upheld, there is no phase of life in the States any element or incident of which involves the passing of persons or things from one State to another that does not fall within the power of Congress to *control* according to its own discretion. It may make it a crime for any person to cross the line between two States on Sunday, although the two States may have made peaceful entrance lawful on that day, and conversely, it may authorize all business intercourse between two States to be carried on on the Sabbath contrary to the laws of both.

II.—Even if the taking of lottery tickets from one State to another were commerce (which is denied), it is insisted that Congress has no power to *prohibit* it. In considering this point it is not necessary to discuss the question of how far Congress can go in determining what things interstate commerce carriers not chartered by Congress may or may not carry from State to State. The sole essential question here is whether Congress has the rightful power (leaving out of consideration questions pertaining to things intrinsically evil or dangerous) to *prohibit* the transmission of *any* article by *any* means not governmental from one State to another, or the passage of peaceful persons across such boundaries, and thus in so far, to establish non-intercourse. In the Articles of Confederation between the States adopted on the 15th of November, 1777, it was provided:—

"ARTICLE IV. The better to secure and perpetuate "mutual friendship and intercourse among the peo- "ple of the different States in this Union, the free "inhabitants of each of these States, paupers, vaga- "bonds and fugitives from justice excepted, shall be "entitled to all privileges and immunities of free "citizens in the several States; and the people of "each State shall have free ingress and regress to "and from any other State, and shall enjoy therein "all the privileges of trade and commerce, subject "to the same duties, impositions and restrictions as "the inhabitants thereof respectively, provided "that such restrictions shall not extend so far as to "prevent the removal of property imported into any "State, to any other State of which the owner is "an inhabitant; provided also that no imposition, "duties or restriction shall be laid by any State, on "the property of the United States, or either of "them."

On the 7th of August, 1786, a committee of the Continental Congress, having the subject of amending the articles in charge, had reported to the Congress seven articles supplemental to those already existing. One of these was as follows:—

"ART. 14. The United States in congress assem- "bled shall have the sole and exclusive power of "regulating the trade of the states as well with "foreign nations as with each other, and of laying "such prohibitions, and such imposts and duties "upon imports and exports, as may be necessary "for the purpose; provided the citizens of the states "shall in no instance be subjected to pay higher "duties and imposts than those imposed on the "subjects of foreign powers; provided, also, that all "such duties as may be imposed shall be collected "under such regulations as the United States in

"congress assembled shall establish consistent with "the constitutions of the states respectively, and to "accrue to the use of the state in which the same "shall be payable; provided, also, that the legisla- "tive power of the several states shall not be re- "strained from laying embargoes in times of "scarcity; and provided, lastly, that every act of "congress for the above purpose shall have the as- "sent of nine states in congress assembled, and in "in that proportion when there shall be more than "thirteen in the union."

Thus it was distinctly and expressly proposed by the committee that the Congress should have "the "exclusive power of *regulating* the trade of the States "as well with foreign nations as with each other, "and of laying such PROHIBITIONS, and such imposts "and duties upon imports and exports, as may be "necessary for that purpose." The report, contain- ing seven new articles, was discussed for thirteen days, but no final action was taken (Bancroft's Hist. U. S. v. 6, pages 190–1–2). The power to regulate by *prohibition* of trade was provided, together with power over both "imports and *exports*." The Convention of 1787 knew all this and (it may be fairly stated) rejected the words "exclusive," "pro- "hibition" and "exports" and agreed upon the very substance and almost the letter of the rest of the Confederation Congress committee's proposition of 1786; thus making the people of all the States one commercial community as between themselves, subject only to the regulations of Congress for the order and equality of interstate intercourse. "Ex- "clusive" was doubtless omitted because the States were left with powers of exclusion in matters of health, &c.; and "prohibition" was omitted because it was flagrantly repugnant to the fundamental idea of "a more perfect Union" and the very liberty of

untrammeled intercourse of the people of all the States; and the social and civil rights and privileges of the people of each State was made the same in every other.

In respect of foreign intercourse the prohibition powers were quite needless in the commercial clause of the Constitution inasmuch as the States were forbidden to have any relations with foreign powers, and the general Government was given all by other provisions of the Constitution.

Thus the entire scheme of the oneness of the whole people in their intercourse and commerce *among* themselves, and their solid oneness in dealing *with* other nations was made harmonious and complete.

When the present Constitution was adopted in 1787, ten years of experience had shown that in spite of the language of article IV., above quoted, securing free ingress and regress to and from the various States and equal privileges of trade, &c., the great and fundamental purpose of the article in respect of trade had been frustrated, and that the people of some of the States had profited at the expense of the citizens of other States in regard to trade. And it was one of the chief objects of the framers of the Constitution to efface these discriminations and State advantages so that trade and commerce between the several States should be as absolutely untrammeled and equal as it would be between the several counties and other municipal divisions of any one State. It was the adjustment of this subject that formed one of the great difficulties in the Convention and that retarded the ratification of the Constitution for a considerable time; and in regard to one or two of the States the ratification did not take place until 1789, and after the Constitution had taken effect.

The Constitution in the eighth section of the first article defined the powers of Congress in respect of

its legislative powers. It gave the power "to regu-"late commerce *with* foreign nations, and *among* the "several States, and with the Indian tribes."

The second article placed in the hands of the President the power by and with the advice and consent of the Senate to make treaties. By the tenth section of the first article the States were prohibited from having any voice whatever in the foreign affairs of the United States or of themselves. It is submitted, then, in view of the provisions cited and of the history of the period, that the business evils developed under the confederation were those affecting the absolute and untrammeled freedom of intercourse of every kind between the people of the several States, and that it was not the purpose to confer upon Congress in the authority to regulate commerce *among* the several States the power to do the very things and more which the States had done or to diminish the intent and effect of the fourth article of the confederation, but to strengthen it, not by giving Congress the right either to favor one State at the expense of another, or to prevent any sort of intercourse among the States, but to debar every State from in any way interfering with the full liberty of intercourse and trade among the people of all the States.

The phrase "*to regulate*" does not necessarily or usually (if ever) imply the power *to forbid*, except, possibly, as to the *modus* of as distinguished from the *subjects* of interstate commerce. If "to regulate" implies the power to forbid, it necessarily follows that Congress may according to its own discretion determine what classes of persons and what classes of things may or may not pass from one State into another. In such case the clause in question should have read that Congress should have power to allow or forbid interstate intercourse

and commerce. There is no midway of interpretation or limitation. It is not too much to say that had Congress within the first fifty years of our history undertaken to exert any such power there would have been a successful nullification unless this court should have held that the Act was void.

It is not only admitted but affirmed that Congress in dealing with foreign commerce has the right not only to regulate it, but to determine what shall be its subjects, and that its power in this respect is supreme and exclusive, because beyond and above the power to regulate is its unquestioned right (forbidden to the States) to deal with every foreign affair in its sovereign character; and, therefore, the contention that the language of the clause in question must have the same meaning and application as to commerce among the States as that with foreign nations is entirely untenable.

Even if the sovereign and exclusive power in Congress and the President in dealing with foreign relations were left out of view, it is submitted that the word "regulate" may have one meaning as applied to one class of subjects and a different or limited one as applied to another class of subjects. The same word is in all such cases construed according to the general intent. See Maryland *vs.* B. & O. R. R. Co., and many other cases.

If anything is clear in the history of the United States, in its Constitution and in the decisions of its courts, it is that what is known as the police power as controlling the conduct of the citizens of the several States and affecting their social order was not conferred upon Congress excepting so far as it related to places and persons within its exclusive jurisdiction. It would be a perversion of the history and purpose of the Constitution to hold that the representatives of the States undertook in framing

the Constitution to transfer the power in respect of the subjects of internal commerce to the discretion of Congress and thus leave it open to combinations between the representatives from groups of States to obtain advantages over the others by subjective legislation.

It is earnestly believed that the decision of this question, arising in a case in itself of comparatively small importance, is of the greatest concern in considering upon what foundations the local liberties and the stability of our governments of distributed powers rest. The several States, it is thought, are quite competent to determine from time to time what shall be their social order and what conduct of their citizens shall be deemed injurious to their general welfare. If this be true, no interpretation of the language of the Constitution should, if it be possible to avoid it, be allowed to open the door for congressional interference.

In view of the true scope of the word commerce, and in view of the common and only proper meaning of the word regulate, and in the light of the history referred to, it is confidently submitted that the validity of that part of the statute applicable to this case cannot be upheld.

The mass of cases bearing more or less directly upon these questions has been so fully cited and discussed in other briefs that they are not herein (with one or two exceptions) referred to.

GEORGE F. EDMUNDS,
Of Counsel for the Petitioners.

As of interest and a convenience to the court the liberty is taken of appending hereto a reprint of the brief of Mr. Carter in the France case, now in the files of the court, which contains an elaborate and valuable discussion of the subject.

G. F. E.

APPENDIX.

MR. CARTER'S BRIEF FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States.

ALBERT L. FRANCE *et al.*

vs.

THE UNITED STATES.

Oct. Term, 1896.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Statement of Case.

Plaintiffs in error were convicted at the February Term (1896) of the District Court of the United States, within and for the Southern District of Ohio and Western Division, of violating section 5440 of the Revised Statutes of the United States which makes it a criminal offense to conspire to commit an offense against the United States.

The overt act which they were charged with having conspired to commit was the causing to be carried from one State to another, to wit., from Covington, Kentucky to Cincinnati, Ohio, certain "papers, certificates and instruments purporting "to be, and representing the chances, shares and "interests in the prizes which, by lot and chance "might be awarded to persons (to these Grand "Jurors unknown) who might select the numbers "which, by lot and chance, should be included in "the twelve numbers drawn and selected, as here-

"inafter stated, at the drawings of the so-called "Kentucky Lottery, and the so-called Henry Lot- "tery," &c.

Sentences of fine and imprisonment were pronounced upon the convictions and a writ of error was sued out by the defendants. The overt act charged as criminal was alleged to be such because it was a violation, as was charged, of the first section of the act passed March 2, 1895, entitled "An "Act for the suppression of lottery traffic through "national and interstate commerce and the postal "service, subject to the jurisdiction and laws of the "United States, and was as follows:

> "Be it enacted by the Senate and House of "Representatives of the United States of "America in Congress assembled. That any "person who shall cause to be brought within "the United States from abroad, for the pur- "pose of disposing of the same, or deposited "in or carried by the mails of the United "States, or carried from one State to another "in the United States, any paper, certificate, "or instrument purporting to be or represent "a ticket, chance, share or interest in or de- "pendent upon the event of a lottery, so called "gift concert, or similar enterprise, offering "prizes dependent upon lot or chance, or shall "cause any advertisement of such lottery, so- "called gift concert, or similar enterprise, of- "fering prizes dependant upon lot or chance, "to be brought into the United States, or de- "posited in or carried by the mails of the "United States or transferred from one State "to another in the same, shall be punishable in "the first offense by imprisonment for not more "than two years, or by a fine of not more than "one thousand dollars, or both, and in the "second and after offenses by such imprison- "ment only."

The objection was taken in various forms at the trial, by motion to acquit, and, after verdict, by

motion in arrest of judgment, that the first section of the act above mentioned was invalid as being in violation of the Constitution of the United States, and the denial of the motions to acquit and to arrest judgment were assigned as error. It is the purpose of the following brief to support those assignments.

First Point.—It is fully sufficient ground for declaring the statute under notice unconstitutional and void to point out the fact apparent and undeniable on the face of the act that Congress, in passing it, *had no other motive or purpose* than to protect the internal morals and welfare of the several States by relieving them from the supposed evils of lottery. If, in *form* and *appearance*, the act is an exercise of the power to regulate commerce, it was a *perversion* and *abuse* of that power.

1. The design of the Constitution of the United States in adopting the bold and novel expedient of admitting two sovereignties to exercise their power in and over the same territory, was that certain *objects* should be accomplished by one of the sovereignties, and certain other and distinct objects, by the other. This was sought to be effected by giving certain legislative powers to Congress in order to effect the one class of objects, and leaving the residue of legislative power in the States to enable them to accomplish the other.

Now it so happens—this is unavoidable—that the exercise of the powers thus committed to Congress may have an effect upon interests which were intended to be left wholly to the States, or that the exercise of powers reserved to the States may have some effect upon interests designed to be entrusted solely to the general government. If in either of the cases supposed the *purpose* of the Legislature was only to carry out the object entrusted to *it*, and the effect of its action upon interests not entrusted to it was incidental only, even if necessary, there is no departure from constitutional action. But if the purpose of the Legislature, while in *form* and *appearance* exercising a power conferred upon, or reserved to itself, was to reach and control an interest wholly entrusted to the other sovereignty, it is a perversion and abuse of power, and just as unconstitutional as if the power itself had not been conferred. In other words, in our American system no powers of legislation are held either by the general or the State governments, for *any and every purpose*, but only to carry out the *ends* for which they were entrusted.

Were the case otherwise the rival sovereignties would be continually encroaching one upon the other, and constitutional law would be in large measure an illusion.

a. An apt illustration of this view is found in the case of State laws in relation to immigration, pilotage and quarantine. Undoubtedly these have an incidental, but necessary, effect upon commerce; but if

their real object was only to protect the State against the necessity of supporting paupers, or to facilitate its internal business, or to guard against the introduction of disease, they are valid enactments. If, however, the real *object* was to control commerce in some particular, they are invalid, although, in *form* and *appearance*, they may be an exercise of powers reserved to the States.

In the City of New York *vs.* Miln (11 Pet., 103), a law passed by the Legislature of New York, requiring masters of vessels to give bonds to indemnify the State against the expense of supporting pauper immigrants, was held, though against weighty dissent, to be constitutional. It did not seem to be anything but a provision designed in good faith to protect the State.

In the Passenger Cases (7 How., 283), the validity of another act of the State of New York, as well as one of Massachusetts, which required the payment of a fixed sum for every passenger landed, was challenged, and held to be invalid on the ground, mainly, that such an exaction from every passenger, whether likely to become a charge or not, went beyond the mere exercise of the police power of the State, and imposed a burden upon foreign commerce.

The State of New York thereupon passed another law, designed to obviate this objection, which required the giving of bonds of indemnity only, a thing not found objectionable in the case of the City of New York *vs.* Miln (*supra*); but it allowed the

masters of vessels, if they chose, to escape this burden by paying a fixed charge for each passenger. The money thus paid was to be devoted to the indemnification of the State against the expense of supporting pauper immigrants.

This act was held to be unconstitutional by a unanimous Court; and the ground was that it was plain that the statute was so framed as to make it preferable for the master to pay the money instead of giving the bond, and was thus but a *roundabout* way of exacting the money. Said Mr. Justice MILLER, in giving the opinion of the Court: "In whatever language a statute "may be framed its *purpose* must be "determined by its *natural and reason-* "*able effect*, and it is apparent that the "*object* of this statute, as judged by that "criterion, is to compel the owners of "vessels to pay a sum of money for every "passenger brought by them from a "foreign port."

2. But how are we to know the motive and purpose of Congress, or of the Legislature of a State (for the same rule must be applied to each) in any particular enactment? Are we at liberty to resort to extrinsic evidence of this? It has been held that we are not, but that we are confined to the face of the law itself. If the legislation appears to be in any way *conducive* to an end entrusted to the body enacting it, it is, so far at least, valid; but if it is conducive to no such end, but wholly to an end committed to the rival

sovereignty, it has no validity, for Legislatures, as well as men, must be held to *intend* the necessary consequences of their acts.

In Minnesota *vs.* Barker (136 U. S., 313), it was held that, "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States."

a. One of the most celebrated judgments of Marshall lays down this doctrine. No *express* power had been bestowed upon Congress to create a bank. Whether that body possessed it as an *incident* was the main question. That great Judge discarding the view that any rigorous interpretation was to be placed upon the term "*necessary*," but at the same time insisting that the means resorted to in the attempted execution of an *express* power should be such as might reasonably be supposed to conduce to that end, drew up the formula which should guide the judicial inquiry in language which has never been found to need amendment: "Let the end be "legitimate, let it be within the scope of "the Constitution, and all means which "are appropriate, which are plainly "adapted to that end, which are not pro-"hibited, but consist with the letter and "spirit of the Constitution, are constitu-"tional."

McCulloch *vs.* The State of Maryland, 12 Wheat., 316, 420.

b. And the same ground is well illustrated by the case of U. S. *vs.* Fox (95 U. S., 670), involving, not State, but national Legislation. In this case the validity of that provision of the bankrupt law (Sec. 5132 of the R. S.), which made it a penal offense for any person to obtain goods or chattels on credit three months before proceedings in bankruptcy by or against him, on the false pretense of dealing in the ordinary course of trade, was challenged. It was held invalid, because there was in such an act *no relation* to the execution of the power committed to Congress to establish a system of bankruptcy. Says Mr. Justice FIELD, in giving the opinion of the Court: "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers * * * may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have *some relation* to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." (p. 672.) An exact syllabus of this decision would be *that Congress cannot make any act a crime, unless it is in some manner "necessary or proper," in the execution of its own powers to do so.*

The case of the United States *vs.* Reese (92 U. S., 214) is also illustrative. The fifteenth amendment provided that the right

of the citizens of the United States to vote should not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; and power was conferred upon Congress to enforce this article by "appropriate legislation." Congress enacted a law, which provided, in substance, that offers by a voter to perform any prerequisites to the right to vote should be deemed, in case of wrongful refusal by election officers to accept the offer, a performance; and the subsequent refusal to accept a vote was made a penal offense. This was held not to be "appropriate legislation;" because it went further than was necessary or proper to carry out the power committed to Congress, and made acts offenses which might not have denied the suffrage on the ground of race, color, or previous condition of servitude.

The same method of judicial inquiry was approved and followed in Dent *vs.* West Virginia (129 U. S., 114). The question arose whether the Legislature of that State had the authority to prescribe certain qualifications for physicians. The right of the State to protect society by requiring some qualification was regarded by the Court as unquestionable; but it did not doubt that this right was subject to limitations, and viewed the question of the constitutionality of any particular legislation as turning upon the inquiry whether it was *appropriate* to the end. Said Mr. Justice FIELD, in giving the opinion of the Court: "The "nature and extent of the qualifications "required must depend primarily upon

"the judgment of the State as to their "necessity. If they are appropriate to "the calling or profession, and attainable "by reasonable study or application, no "objection to their validity can be raised "because of their stringency or difficulty. "*It is only when they have no relation to* "*such calling or profession*, or are un- "attainable by such reasonable study and "application, that they can operate to de- "prive one of his right to pursue a lawful "vocation."

And the case of Cummings *vs.* The State of Missouri (4 Wall., 277), is also in point. In that case the validity of provisions of the Constitution of Missouri, exacting a rigid oath of loyalty as a *qualification* for voting, holding office, &c., was challenged. The Court did not question the right of the State to exact *qualifications* for the discharge of public functions, but, looking into the oath in question, it found it to be not really of the nature of a qualification, and therefore condemned it. Said Mr. Justice FIELD, in giving the opinion of the Court: "Qualifications relate to "the fitness or capacity of the party for a "particular pursuit or profession." And, after discussing some of the acts which the party was required to swear he had not been guilty of, he added: "It is manifest "upon the simple statement of many of "the acts, and of the professions and pur- "suits, *that there is no such relation be-* "*tween them* as to render a denial of a "commission of the acts at all *appropriate* "as a condition of allowing the exercise

"of the professions and pursuits" (pp. 319, 320).

And in *ex parte* Garland (4 Wall., 333), an Act of Congress of a similar character was declared unconstitutional on the same grounds.

c. And to the like effect also are the cases arising upon the municipal ordinances of San Francisco in relation to the carrying on of laundries. In the cases of Barber *vs.* Connolly (113 U. S., 27), and Soon Hing *vs.* Crowley (*Ib.*, 703), ordinances forbidding work to be done in laundries in certain places, from ten at night to six in the morning, were held unobjectionable, for the reason that they appeared, *on the face*, to be not unreasonable police regulations for the protection of the good order and peace of the community. It may have been that the real object was to disfavor the Chinese, but the Court would not indulge this supposition when nothing upon the face of the ordinance warranted it. But when a different ordinance was framed, forbidding the carrying on of laundries in San Francisco without the consent of the supervisors, and its validity was challenged, it was promptly condemned, on the ground that it did not provide for anything in the nature of *regulation*, but gave an *arbitrary* authority to the supervisors to grant or deny what should be a common privilege (Yick Ho *vs.* Hopkins, 118 U. S., 356).

d. So also in those cases where, under State laws, wharfage is exacted, this Court has made the question of their validity turn upon whether they were *really intended* to fix a reasonable compensation for that facility, or to impose an exaction upon commerce. Said Mr. Justice MILLER, in giving the opinion of the Court: "In "all cases of this kind it has been repeat- "edly held that, when the question is "raised whether the State statute is a "just exercise of State power, *or is in-* "*tended as a roundabout means to invade* "*the domain of Federal authority*, this "Court will look into the operation and "effect of the act to discern its purpose." (Morgan *vs.* Louisiana, 118 U. S., 455, 462. See also Ouachita Co. *vs.* Aiken, 121 U. S., 488.)

e. The numerous cases upon the validity of State laws imposing license fees upon traders, drummers, agents, etc., furnish other illustrations of the same doctrine.

f. We close these citations with an extract from a recent decision of this Court, already cited, which presents a striking instance of the necessity which this Court has recognized of scrutinizing the *purpose* of a law with a view of determining whether it was designed to carry out an acknowledged power of the legislature, or to accomplish an end which was beyond its powers. In 1889 the State of Minnesota had passed a law providing for the inspec-

tion of meats before the animals were slaughtered, and its validity was attacked on the ground that it tended, and was designed, to impose a burden upon interstate commerce. It has always been conceded that the passage of laws providing for the inspection of food, &c., was clearly within the powers of State legislatures, and although there was nothing upon the face of this statute which in terms operated upon interstate commerce, this Court did not hesitate to say that it was designed to operate upon that commerce, and was consequently invalid (Minnesota *vs.* Barber, 136 U. S., 313.)

Mr. Justice HARLAN in giving the opinion of the Court, after referring to prior cases, which had been hereinbefore cited, employed very happily conceived language:

"Upon the authority of those cases, and "others that could be cited, it is our duty "to inquire, in respect to the statute "before us, *not only whether there is a* "*real and substantial relation between* "*its avowed objects and* the means devised "for attaining those objects, but whether "by its necessary or natural operation "it impairs or destroys rights secured "by the Constitution of the United States" (p. 320).

g. It would, of course, as already intimated, be entirely repugnant to the spirit of the Constitution, and to the equality of the States and the general government in their respective spheres of sovereign action, if

the same rule were not applied in determining the validity of a congressional enactment. The same rule has always been applied to each case.

3. Proceeding to examine this statute in the light of the above doctrines, it is immediately manifest that if it be, in *form* and *appearance* even, an exercise of the power to regulate commerce, *that* thing is no part of its real purpose; but that its real purpose and motive are to usurp the police powers of the States over internal morals.

a. It is absolutely no part of the motive or purpose to protect or benefit in any way, either foreign or interstate commerce. The mere carrying of lottery documents from one State to another, or bringing them from abroad, has no bearing or effect whatever upon commerce. It relieves it from no burden, furnishes no additional motive for it, facilitates it in no way, and commerce both foreign and interstate would proceed after its enactment precisely as before.

b. It accomplishes precisely what a similar statute enacted by the several States would accomplish and no more. Any State would have indisputable power to enact both that no lottery documents should be brought into it, or carried out of it, which is all that this statute enacts.

c. Legislation upon commerce, whether foreign or interstate, must relate and be confined to either (1) *the highways of such commerce*, that is, either the sea or the navigable waters of the country, or the public land highways, such as the roads and railways when used for interstate transportation; or (2), the *instrumentalities* of such commerce, such as ships or land vehicles (when used in interstate commerce); or (3), the *agents* of such commerce, such as carriers when engaged in carrying it on; or (4), the *subjects* of such commerce, such as articles of trade and merchandise when set apart and destined for foreign or interstate transportation, or their documentary substitutes.

Commercial intercourse, which is the broadest definition of commerce ever laid down, embraces the above-enumerated matters and them alone. This act neither relates to or affects either of them. It is aimed at no ship, no highway, no carrier, no article that is bought and sold.

d. If a doubt could be started as to any one of the above particulars it would be as to an article of trade which could be bought and sold, and it might be suggested that a lottery ticket could be bought and sold; but it is needless to consider this, for the provisions of the act extend even to any *advertisement*, that is, any written or printed information of a lottery.

e. It forbids the *mere* carriage from one

State to another of any of the documents referred to in it, not by any ship or land conveyance, or over any highway of commerce; but in any way whatever, so that if a man should carry one of the papers in his pocket through the fields across the boundary line between two States he would incur the penalties of the act. Nor, so far as interstate transmission is concerned, is it requisite that the papers should be carried for the purpose of disposing of them to others; but the penalty would be incurred if a man should carry them pursuant to instructions to put them in the fire on the other side of the line.

Second Point.—But the statute is unconstitutional and invalid, irrespective of the purpose and motive with which it was passed. It is not even in *form* and *appearance* an exercise of the power to regulate commerce; but of the police power reserved to the States of protecting their interior morals and welfare.

1. It will not be pretended that there is anything in the circumstance that papers or documents relate, in some manner, to *lotteries*, which gives to them a *commercial* character, so as to enable Congress to prohibit the carriage of them from one State to another, when it would not, or might not, have the power to prohibit such carriage of other things. If Congress has the right to

prohibit such carriage of lottery documents, it can only be because it has the power to prohibit such carriage of any tangible thing whatever. And inasmuch as the prohibition is not limited to carriage on any navigable waters of the United States, or any public *highway* of commerce, nor by any ship, car, or other vehicle employed as an *instrumentality* of commerce, nor by any carrier or other *agent* of commerce, nor for any *purpose* such as *sale*, or other disposition, the power assumed to be exercised by Congress in enacting the law is a power to prohibit the carriage from one State to another of any tangible thing in any manner whatever, over highways, or through fields, and for any purpose whatever. If it be said that Congress would not have the power to prohibit such carriage of *innocent* things, for the reason that it would be a deprivation of fundamental rights, the above statement may be qualified by adding to the word "prohibit" the qualification of "or to regulate" as by requiring a license, or imposing some other condition.

In short this legislation assumes that *the mere carriage in any manner, for any purpose, of any tangible thing across the boundary line separating two States is commerce!* And unless this precise proposition can be made out the statute cannot be defended.

a. According to this if a man going from one State to another, happened to take with him in a trunk, bag or other receptacle, or even in his pocket any tangible things

documentary or other, this would be commerce in such things, and whether he went by rail, wagon, or on foot, or over a highway, or through fields.

b. If a man removed his home from one State to another, even though the distance were less than a mile, and took his household goods and chattels with him, it would *be commerce* in those things.

c. If *persons* could be regarded, as they have sometimes been thought susceptible of being regarded, as imports and exports, the visit of a young man to his home in another State to spend Thanksgiving would be *commerce.*

d. It may be argued that "commerce" has been defined as "*intercourse,*" and that if this be correct any communication between different states is interstate commerce. This definition has, indeed, been frequently given, and its author was Marshall, but he did not commit the absurdity of saying that *all* intercourse was commerce. He said: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial* intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (Gibbons *vs.* Ogden, 9 Wheat., 1); and, while this definition has been many times adopted, it has always been with the qualification limiting it to

commercial intercourse. Surely it does not embrace family or social intercourse.

c. It might be asked whether if one man hired another to transport goods for him from one State to another, it would not be commerce, even though the transportation was by a private vehicle and through the fields. Undoubtedly it would be commerce if the purpose were a *commercial* one, that is to say, if it were connected with the purchase, sale or exchange of them, and not otherwise. But, however, this might be with *articles* of commerce, it certainly would not be with such things as lottery documents which are not articles of commerce. What articles of commerce are has been determined by this Court. They are *such* things as have a value in themselves and are bought and sold in the way of trade. Such things as policies of insurance whether fire or marine are not articles of commerce; and still less can lottery documents advertisements, &c., be such.

Paul *vs.* Virginia, 8 Wall., 168, 183.
Hooker *vs.* California, 155 U. S., 648.

2. There is nothing in the decision *in re* Rapier (143 U. S., 110), at all conflicting with anything above argued. In that case the question was as to the constitutionality of a law excluding lottery matter from the *mails*. The law acted upon a physical instrumentality within the exclusive legislative power

of the general government, and it was held that the States in surrendering to the United States the exclusive control of the mails surrendered it in as perfect a manner as they, before the constitution was adopted, possessed it; and that as, prior to the surrender, the States could have exercised the challenged power, and could not afterwards, the general government could exercise it.

But in relation to the present statute there has been no such surrender, and the State legislatures may unquestionably enact just such a law. They would not, however, prefix such a title to it.

Third Point.—But the statute in question is invalid, not only for the reason that none of the powers conferred upon Congress were sufficient to authorize it, but also because Congress was, by an *express restriction upon the exercise of those powers*, prohibited from making such a law. It assumes the power to declare what printed or written matter shall be carried from one State to another, not only by the mails, *but in any way or manner whatsoever*. It is, therefore, a law "abridging the freedom of the press" within the meaning of the First Amendment.

I.—It is important to keep in mind throughout this discussion, that the constitutional safeguard thus invoked is not so much a limitation

upon the *express powers* enumerated and granted to Congress, as it is a restriction upon the *legislative means* to be employed in the exercise of those powers. Speaking with precision, it is a restriction upon the *incidental* powers which Congress may exercise in carrying out its express powers. When read, as it should be, as a part of the Constitution, it is as if the Seventeenth clause of the Eighth section of Art. I. contained these words. The Congress shall have power "To "make all laws which shall be necessary and "proper for carrying into execution the fore-"going powers, and all other powers vested by "this Constitution in the Government of the "United States, or in any department or officer "thereof; *provided, however,* that it shall "make no law abridging the freedom of the "press."

The argument, therefore, upon which we are now entering is to the effect, that if the power of thus prohibiting the circulation of printed and written matter be regarded as incidental to the power to regulate commerce, Congress is prohibited by the First Amendment from exercising it.

II.—Any discussion of the question, whether an enactment of Congress abridges the "Liberty of the Press," should properly start with a clear statement of what that phrase imports, or rather what it imported at the time of the adoption of the Federal Constitution, for it was the particular Liberty of the Press which then existed, which was, and is, protected by the constitutional safeguard.

Our proposition is, that this Liberty of the Press *imported the liberty of free discussion in print, without any restraint, save that which was imposed by the law of libel as it then existed in the jurisprudence of England and her American Colonies.*

1. The primary meaning of *liberty* is *exemption from restraint;* and absolute liberty imports entire freedom in the individual to do whatever he pleases. Such absolute liberty does not exist in any form of society, either civilized or barbarous. The very existence together of more than one individual brings with it some restraint, either of force or fear.

   The actual Liberty of the Press, which the constitutional safeguard secured, was the liberty of discussion in print, qualified and limited by those restraints which society had ascertained and declared to be necessary to social peace and order.

2. The inquiry, then, becomes what were the restraints which, at the period in question, could be imposed upon the liberty of free discussion in print. These cannot be justly apprehended without some brief examination into the nature, the importance, and the history of free discussion.

   It will at once become manifest that we are dealing with a subject which, so far as concerns free government, transcends every other in importance.

   a. In most human societies, if not in every

one, there are found two opposing tendencies; one on the part of those in power to preserve the existing state of things, which is to preserve their own supremacy; the other on the part of those who are governed, to reform and improve as they think, the existing condition. It matters not whether the government is absolutely despotic, or in the hands of an aristocracy, or in those of a majority, as in a republic. The opposing tendencies, though operating with different degrees of activity, are, in each case, present.

c. Government is but the exercise of *power*. And this is true whether the power is arbitrary and despotic, or limited by custom and tradition, or, by constitutional forms, to the enactment and execution of regular laws. Its essential nature is *restraint*.

d. Every despot identifies government with himself; and views any attack upon himself as an assault upon the State. The *disposition* is the same in the freeest of States. Those in office, and the majority which they represent, are apt to think that the safety of the State depends upon their retention of the sovereign power. It is less apparent, but really true, that in republics, as well as despotisms, all attempts to undermine the authority of the governors are viewed by them as offenses, and will be met with as great an exercise of repression, either arbitrarily or by law, as those in authority may think it safe to ex-

ercise. The spectacle of a party in a republic seeking by an exercise of the power it has gained to intrench itself in its position is entirely analogous to the arbitrary persecution by a despot of his supposed enemies.

e. All government rests upon *opinion.* This is as true of despotisms as of republics; although the former are less sensitive to opinion; and it is, if not theoretically acknowledged, tacitly felt, by all governments. And hence, all governments, whether temporal or spiritual, have viewed *free discussion*, which creates, concentrates and consolidates opinion, as a menace to their existence, and have conscientiously regarded it as a duty to repress it.

f. The conflicts thus engendered have resulted in the most bitter persecutions and the most devastating wars; all the more bitter and devastating from the fact that the combatants on each side have been equally sincere and equally confident that the salvation of society depended upon their success. The overthrow of one set of rulers has been succeeded by the elevation of another equally intolerant, and equally ready to employ the same arts of repression which had been exerted against themselves.

g. But for some centuries there have not been wanting enlightened minds who have perceived that such an exercise of the

powers of society was not consistent with the advancement of truth, either in morals, religion or government; and that some other solution must be found for the question how far the right of free discussion should be limited and restrained.

That solution was found a century and more ago by Great Britain, in the thorough establishment of the doctrine of the Liberty of the Press, as explained in the proposition stated under subdivision II of the Third Point of this brief, and it has been accepted by the States and Colonies, of which she has been the parent. It has been acknowledged and accepted to some imperfect extent by other European nations, but can hardly be said to have become incorporated into the fundamental law in any of them. The extent to which this solution is acted upon by any State, marks the degree of its freedom and civilization, and its capacity for progress.

III.—Liberty of the Press, as thus understood was, as all great achievements are, the fruit of a long struggle, in which there may be discerned two successive principal stages, in each of which the principle received a distinct enlargement and more exact definition. It is of much importance, to a just apprehension of the principle, that this gradual development should be studied.

1. The first stage of this development was

marked by the abrogation of all *censorship* of the press, which left men free to print and publish their opinions without *previous* restraint.

a. The application of the art of printing furnished a new and prodigious instrumentality for creating, consolidating and disseminating *opinion;* and consequently for attacking government, religion, and all establishments resting upon opinion. The disposition to employ repressive power, always natural to those who are the custodians of it, was everywhere yielded to, and the most effective form of repression—that which acted *beforehand*, and directly *prevented* the obnoxious practice—was resorted to, not only under despotic governments, but even in England.

This authority was asserted under the form of a *censorship*, or *previous* restraint, and permitted nothing to be printed except such matter as had been *allowed* by the censor, and made provision for the summary search, seizure and destruction of unlicensed works, and of the presses, material, etc., employed in printing them.

b. This power seems originally to have been exercised by the Crown itself; and in two forms—*first*, by the prohibition of printing anything not allowed by the licensor; and —*second*, by vesting the exclusive privilege of printing, even under these restrictions, in a few favored grantees, the two Universities, and the Printers' and Stationers' Company

of London. At a subsequent period it was lodged in a body every way fited for such a purpose—the Star Chamber. It was asserted by the Long Parliament during the vacancy on the Throne, and, after the Restoration, was again vested in the Crown by Acts of Parliament.

For an account of the origin and nature of the censorship the following authorities may be consulted:

May, Con. Hist. of England (N. Y., 1874,) vol. 2, Art. IX., pp., 102–106.

Entick *vs.* Carrington, 19 How. St. Tr., 1029. 13 & 14 Car. II., c. 33.

Scarlett, *arg.* Rex. *vs.* Burdett, Lord Abinger's Mem., p. 297.

Erskine's speech for Thomas Carnan (Speeches, Lond. 1810, vol. 1, p. 38).

Dicey's Law of the Constitution (Lond. 1886, p. 274.)

Odgers' Libel and Slander, (2 Lond. Ed., 10.)

Paterson, Liberty of Press, Speech & Worship, 38–61.

c. A prerogative of this nature, involving as it did the destruction of property and the deprivation of personal rights without previous accusation, trial and conviction, committing the determination of the most important questions to the arbitrary decision of a man who would necessarily be but the tool of those who appointed him, was wholly inconsistent with the fundamental principles of English liberty then beginning to assert themselves. It was inevitable that sooner or later it would be deliberately challenged and overthrown.

An order of the Long Parliament in 1648 drew from John Milton his "Areopagitica," in which he defended the liberty of unlicensed printing with all the power and splendor of his genius.

d. Limited in their operation to the period prescribed in them, it was necessary to the continuance of the restrictive policy that the censorship laws should be from time to time renewed, and the growing antipathy to them naturally expressed itself in opposition to the attempts at renewal.

A select committee of the House of Commons was appointed in 1695 to report what temporary acts then about to expire should be renewed; and it reported in favor, along with others, of the act creating a censorship of the press; but when the vote of the House was taken on this recommendation it was decided in the negative. The Lords sent back the bill, containing other temporary acts, with an amendment embracing the one thus rejected; but the Commons refused to concur, and, upon a conference, the managers on the part of the Commons delivered to the Lords a weighty report condemning the whole system of censorship, and the Lords yielded.

This report dwelt more upon the incidental evils of the system of licensing, such as jobs, exactions, seizures, domiciliary visits, &c., than upon the general advantages of free discussion, and in this the historian Macaulay finds matter to gratify his love of paradox.

"Such," says he, "were the arguments which did what Milton's Areopagitica had failed to do." But it would be a mistake to suppose that that immortal plea for the freedom of thought, speech and the press had then passed from the minds of men.

This action of Parliament is declared by the same historian to have "done more for liberty and civilization than the Great Charter, or the Bill of rights." (Macaulay's Works, New York, 1866, vol. 4, pp. 124–126.) That it was this action which constitutes the *beginning* of the era of the Liberty of the Press in England is everywhere agreed.

2. It was, however, but the beginning. Free discussion may be restrained as well by *subsequent punishment*, as by *previous restraint*. It is, in either case, only *the fear of punishment* which operates to prevent men from publishing what they may have a desire to publish. And this fear may be created as well by annexing penalties to the *publication* of writings in some manner *specified* and *described*, as by forbidding the publication of *unlicensed* writings under similar penalties.

The *censorship* had fallen almost upon the first deliberate attack. It was far otherwise in respect to the question of *subsequent punishment*.

It was agreed upon all hands that no man could be punished for publishing any writing unless it was what the common law as it then stood denounced as *libellous*. But the

momentous question arose in whom was the power lodged of ultimately determining whether a publication be libellous. If it were reposed in a select magistracy created by, and dependent upon, the arm of power a restraint might be re-established quite as tyrannical and effective as the censorship. If it were committed to ordinary juries taken from the body of the people and exercised under all the safeguards of a regular jury trial, the largest possible measure of freedom would be secured. The advocates of privilege and prerogative—the *possessors* of power—naturally took the first position. The advocates of freedom asserted the second. After a memorable contest which "shook the foundations of Westminster Hall," and was carried into Parliament, the latter obtained a complete and final triumph. *And this marks the second stage in the struggle* for the liberty of the press.

May's Const. Hist. of England, Vol. 2, pp. 108, 122.

a. There were two ways in which after the fall of the censorship a restraint more or less effective might have been asserted. One was by a legislative change in the common law of libel. Parliament might have enacted that any publication calling in question the powers of magistrates or other public officers, or the authority of the established church, or advocating certain designated views upon morals or government, should be deemed libels. Such laws would theoretically, at least, and, in most cases, in fact, have required

juries to find publications to be libellous which would before have been held innocent. Such attempts seem never to have been made in the British Parliament. Probably, at no period subsequent to the revolution would they have been successful.

The other method was by asserting that the question whether a paper is libellous is a question of *law* to be determined by the Court, whose instruction the jury is bound to accept, confining itself to the question of *publication* alone. This is substantially clothing the Judges with the same power which, as above indicated, the Legislature might assert.

b. As already indicated the partisans of power and restraint accepted the latter method. There were divers reasons for this preference. It would not arouse the opposition which might be excited by attempts to *change* the law. The decisions of the Courts are not enactments, but declarations of what the law *is*. Moreover, there were plausible grounds upon which such a view might be defended. The construction and import of writings is, in general, a question of law. And at this period, although the precedents were not uniform, *there were some* at least, if not a majority, in accordance with the view. And finally this doctrine did not, on its face, *appear* to assail the liberty of the press. Those who advocated it could still agree with their opponents, that a man might publish with impunity anything which at common law was not a libel.

c. But the whole question of the freedom of the press, was wrapped up in the question whether the ultimate decision be lodged with the Judge or the jury. If with the former, that freedom would be under the control of a fixed magistracy necessarily inclined to support the pretenses of power, and the same reasons which guided the action of the censorship, would be made the grounds of judicial determination. This truth became well illustrated in the course of the struggle with which we are dealing. The censorship act (13 and 14, Car. II., c. 33) was from time to time renewed down to 1679, when it was permitted temporarily to expire. The support of the pretenses of the Crown was then devolved upon the Judges; and how thoroughly they were prepared to render that service may be seen by the doctrine declared by the twelve Judges, Scroggs, C. J., at their head, in Carr's case, 1680 (7 St. Tr, 929), that it was criminal at common law to write on the subject of government, whether in praise or censure; "for no man has a right to say *anything* of government!" (See also, Entick *vs.* Carrington, 19 How. St. Tr., 1069–1071.) But if the decision were lodged with the jury, it would reflect the sentiment of the public, and consequently secure to the press that real freedom so essential in enlightened government.

d. That the real issue was of this nature was not, at first, distinctly perceived. The Judges naturally assumed the office of in-

structing juries what were libels and what were not, without, however, at first, insisting that it was not competent for the jury to pass upon that question themselves; but, finally, cases arising where it was feared that the juries might acquit contrary to the opinions of the Judges, the latter came to insist that the jury were concerned alone with the fact of publication and the truth of the innuendoes, and must leave the question of the character of the publication, as criminal or innocent, to the Court.

It was at once perceived by the liberal statesmen and lawyers of the time that this position, if established, rendered the liberty of the press an empty sound, and that the old doctrines of the censorship would be renewed under another form. Under the powerful influence of Lord Mansfield the twelve Judges were brought to something like an agreement in favor of this menacing doctrine; but the boldest spirits of the English Bar supported by the most distinguished statesmen of the time, Lords Chatham, Camden (himself an illustrious lawyer), Burke, Fox, Sheridan and others denounced it as an outrageous perversion of the ancient law of the realm.

c. The champion *of the doctrine* of restraint, Lord Mansfield, pronounced the first deliberate opinion on the question in the case of The King *vs.* Woodfull, in 1770 (20 St. Tr., 895). The trial had been before him, and in his charge to the jury he had de-

livered to them his opinion of the liberty of the press as follows: "As for the liberty "of the press I will tell you what that is; "the liberty of the press is that a man may "print what he pleases without a license; "as long as it remains so, the liberty of "the press is not restrained"! He then told the jury that the question of libel or not libel was not for them, and this charge was held correct by a subsequent decision of the Court on a motion for a new trial. But, soon after the trial, and before this decision had been delivered, the public mind had taken alarm at these doctrines and had found expression in a motion by Sergeant Glyn in the House of Commons for a committee to enquire into the proceedings. Upon this motion, in the course of a long debate, the Chief Justice was severely censured by the mover, as also by Dunning and Burke, and defended by the Attorney-General and by Thurlow, as well as by Charles Fox, who had not then arrayed himself on the popular side (Part First, 1211–1302).

He was also assailed in the House of Lords by Lords Chatham and Camden. After the delivery of his judgment in the King's Bench, he was formally attacked by the latter and challenged to debate the question. He at first seemed to accept the challenge, but finally declined and remained silent, to his great discredit, as Lord Campbell informs us.

Lives of the Chief Justices (New York), Vol. 4, pp. 387–393, 485.

f. The judgment in The King *vs.* Woodfull had no effect in settling the question. It was again revived and made the subject of a great and memorable debate in 1784, in the case of the King *vs.* The Dean of St. Asaph, in which Erskine made the immortal argument which will forever stand as the finest union of perfect logic and fitting eloquence in the language. Drawing a just distinction between private and public libels, he asserted concerning the latter:

(1.) That the question of guilty or not guilty on an indictment could not in general be determined without determining the *intent* with which the writing was published; and that this had nothing in it resembling a question of *law*, but was a pure question of *fact*.

(2.) He exposed with pitiless severity the pretense that a verdict of guilty on an indictment for a libel, differing from a like verdict in other criminal cases, proved only the fact of publication, and left the question of guilt or innocence wholly undecided. He put it to the Court to answer these questions. If the jury have nothing to do with the question of libel or no libel, why have the Judges for a hundred years been so sedulous to expound to them that the publication was a libel? Why is a verdict of *guilty* asked for and given, if the question of guilt is withdrawn? How is is that where the indictment is laid upon a part of a writing or book, the jury is permitted to take into consideration the whole writing or book?

(3.) And he put it with unanswerable force that inasmuch as sentence and execution might immediately follow a verdict of guilty, the defendant would be punished without a trial, if, as Lord Mansfield had declared, the verdict of guilty left the question of guilt or innocence open.

(4.) He showed that the authorities, even in the King's Bench, had been far more uniform, and that the doctrine for which he contended had the support of the Judges in the great case of the seven Bishops, and of the commanding authority of Holt in Hutchin's case.

(Erskine's Speeches, Ridgeway's Ed., Lond., 1810, Vol. 1, p. 264 *et seq.*

The above are but a few among a multitude of arguments and illustrations with which the great advocate overwhelmed his adversaries.

The spectacle exhibited by Lord Mansfield in affirming the ruling of Butler, J., against the argument of Erskine was most pitiful (3 Term Rep., 428 n.) He made no attempt to answer it. He could make none with any show of success. He was obliged to admit that his doctrine of a verdict of guilty on a general plea of not guily, left the question of guilt undetermined and was equivalent to a special verdict in other cases, was an anomaly in English law, and fell back for his support of his pretended anomaly, not upon any considered decision founded upon deliberate argument, but upon what he alleged to be the *understanding* of the Bench and Bar. He even asserted that this had been the general un-

derstanding among the leaders of the popular party, and in proof of his assertion, imputed to Pulteney the following lines as having been written by him in a ballad:

"For twelve honest men have decided the cause,
Who are judges of fact though not judges of law."

In truth the lines in Pulteney's ballad, were precisely the reverse. They ran:

"For twelve honest men have determined the cause,
Who are judges alike of the facts and the laws."

(Lord Campbell's Lives of the Chief Justices, New York, Vol. 3, p. 450.)

f. This great argument of Erskine was printed at the time and widely circulated, and sank deeply into the public mind. It was never answered; and it may safely be said that the general judgment of the profession ever since has been that Lord Mansfield's doctrine was a perversion, and not a declaration, of the English law. Lord Campbell pronounces it to have been "based upon a transparent fallacy" (Lives of the Chief Justices, New York, Vol. 4, p. 450). The conviction of the public mind, well established long before, was finally made thoroughly effectual in 1792 by the passage of the bill introduced by Mr. Fox, who had then become a convert to popular principles, which enacted in effect that in public prosecutions, while the Judges might declare their opinions as

to whether a paper was a libel, the jury should have the right to pass upon the question in giving the verdict. This act purported to be, what it was in fact, simply declaratory of the pre-existing law. It was passed unanimously in the House of Commons, and by a large majority in the Lords.

g. The doctrine rests upon impregnable foundations in reason. When any charge is made against an *individual*, a fact is asserted, the *truth* of which may be tried, and, unless justified, or shown to be privileged, malice, and consequently guilt, must be imputed to the defendant. But what is called a *public* or *seditious* libel is not a charge against any *person*, but the assertion of something supposed to be detrimental to correct principles of morality or government. It is, therefore, an attack upon *opinions*, and can be nothing but *opinion* itself. And the question whether such publications are true or false, can never be matter of *law*, except under some government which undertakes to establish *by law* what truth is in respect to morality or government, and to forbid the expression of opposite opinions.

The modes in which men may express their opinions are as various as the natures of different individuals, and it is impossible to define bounds or limitations within which the expression may be confined.

But it is not doubted that publications may be made with *intent* to overthrow by unlawful means the institutions of govern-

ment. These cannot be defended as expressions of opinion. They are not aimed to produce conviction. Obscene books and pictures, writings teaching what are universally acknowledged to be crimes, are not discussion and debate, and may doubtless be condemned, and the authors and publisher of them punished. There is a universal consensus to the point that social peace and order by means of government shall be preserved. This is necessary even to free discussion.

The question, therefore, must always be whether any writing charged to be libellous is an honest, *bonæ fide* attempt to express opinions really entertained, or a dishonest effort to inculcate vice and crime. Manifestly this must always be a question of *fact*, and of fact alone. The writing may be, and usually is, important *evidence* of the fact, but cannot supersede other evidence. The circumstances under which it was written,—the other parts of the paper not charged as libellous—the character and conduct of the writer—all these constitute information which may be laid before the jury to enable it to ascertain the vital and material fact of *intent*.

h. It follows as a corollary from the foregoing that there cannot be any further definition of a public or seditious libel, than that it is a publication intended to be hostile to government and to bring it into contempt. This may be said to be universally admitted, both by lawyers and statesmen. It has never been otherwise defined.

Lord Lansdowne, in H. L., 41 Parl. Deb., 7–15.

Protest of the Peers, *Ibid.*, 747.

Brougham's Contributions (London and Glasgow, 1856, vol. 3, p. 157).

Hamilton. (Crosswell's Case, Works, New York, 1886, vol. 7, pp. 334, 343).

The impossibility of definition is well stated by Sir James Macintosh: "Those "who slowly built up the fabric of our "laws never attempted anything so ab- "surd as to define by any precise rule "the obscure and shifting boundaries "which divide libel from history or free "discussion. It is a subject which, from "its nature, admits neither rules nor defi- "nitions. The same words may be per- "fectly innocent in one case and most "mischievous and libellous in another. "A change of circumstances, often appar- "ently slight, is sufficient to make the "whole difference. These changes (which "may be as numerous as the variety of hu- "man intentions and conditions) can never "be foreseen or comprehended under any "legal definitions, and the framers of our "law have never attempted to subject them "to such definitions."

i. If the truth of doctrines may be evidenced by their salutary effects, no further defense of those above stated would be needed than a simple reference to history.

It is a melancholy task to peruse the criminal records of England while the doctrine of Lord Mansfield was enforced, and observed the chequered spectacle—a host of prosecutions instituted, often for the expression of the most innocent, or even laudable, opinions—verdicts extorted from juries against their will, and at other times juries defying the instructions of Courts. But since the passage of the Libel Act of Mr. Fox the scene is entirely changed. Prosecutions for public libel are extremely rare; and the notion that the existence of government or morality can be seriously threatened by any publication of mere opinions has been dismissed as a silly delusion.

3. The preceding discussion has made it clear that for more than twenty years immediately preceding the adoption of the Federal Constitution there were two rival views concerning the liberty of the press in England, one being that declared by Lord Mansfield, namely, that "a man may print what he pleases without a license," but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the privilege of defending his innocence before a jury; and the other, *that which vouchsafed* to him this privilege, and which was well stated by Lord Kenyon as follows: "After "all, the truth of the matter, as to the lib- "erty of the press, is very simple when "stripped of the ornaments of speech, and a

"man of plain common sense may easily un-
"derstand it. It is neither more nor less
"than this: that a man may publish any-
"thing which twelve of his countrymen
"think is not blamable, but that he ought
"to be punished if he publishes what is blam-
"able. This, in plain common sense, is the
"substance of all that has been said upon
"subject." (Rex *vs.* Cuthill, 27 St. Tr., 675). If, as we have endeavored to show, Mr. Fox's act was but declaratory of the pre-existing law, it is quite immaterial that the above definition was given some two years after the passage of that act.

The important question is, in which sense the term "Liberty of the Press" was employed in the First Amendment. The preceding discussion seems to relieve that question of doubt. How can we doubt that the framers of the Constitution themselves devoted to free principles of government, detesting the doctrines of arbitrary power, with the spectacle then actually before their eyes of the conflict going on in England between these rival views—a struggle in which all who had been their friends were upon the popular side—a struggle substantially finished by the triumph of that side—intended by the phrase "Liberty of the Press," precisely that liberty which was not only guarded by exemption from previous restraint, but defended by the safeguard of a jury trial?

4. But such a question can hardly be raised since the decision of this Court in Boyd *vs.*

The United States (116 U. S., 616). In that case the validity of the legislation authorizing the issuing of a warrant in revenue cases for the seizure of books was challenged and determined in the negative. The question was declared to turn upon the import of the language in the Fourth Amendment, "unreasonable searches and seizures," and in order to ascertain this, the Court, setting the example which we have endeavored to follow in this brief, went back to the struggle in England over the question of general warrants, which was terminated by the memorable judgment of Lord Camden in Entick *vs.* Carrington (19 St. Tr., 1029), and, declaring that that contest must have been familiar to the framers of the Constitution, did not hesitate to say that they must have entertained the same views which the lovers of liberty at that time entertained, both in England and in this country, and held the warrants to be illegal.

That struggle over general warrants of seizure was but a part of the struggle for the liberty of the press which has been herein recounted, as will be seen by a reference to Lord Camden's judgment; and the inference that the framers of the Constitution entertained the same views respecting general warrants as those declared by that great Judge is no clearer than the inference that by "Liberty of the Press" they intended the same liberty which, in that same struggle, he and the other advocates of popular rights asserted and successfully maintained. It cannot be that men who at that time thought it necessary to insert in the American Constitution provisions to forever secure the liberty

of the press, designed simply to protect the press against a censorship. The censorship had been dead for a century, and there was no possibility or thought of reviving it. There had been two parties upon the question of free discussion. Its enemies took the ground that the liberty of the press consisted simply in the absence of a censorship. Its friends asserted that whether a publication is innocent or criminal, must be left to the determination of a jury. It must have been this view which the founders of the American Commonwealths, both State and National, determined to incorporate into the fundamental law.

5. But, in truth, while the obnoxious practice of issuing general warrants was but part of the system of restraint upon free discussion, and the First and Fourth Amendments were thus aimed at substantially the same abuse of power, it may be said with equal truth that *all* of the ten amendments proposed by the First Congress had the same common object. They contain a precise enumeration of all the principal doctrines which had been asserted by the popular party in England during the entire struggle against prerogative and power, and which together constituted what was then, and still is, known as Civil Liberty. Each one of them points to a particular liberty which had long been striven for, and stamps it as something which was to be forever thereafter deemed as finally secured and placed beyond future peril.

6. The contemporaneous exposition by those principally instrumental in the framing of the Constitution is in entire accordance with the foregoing views. It is nowhere better expressed than in Hamilton's masterly brief in the celebrated case of The People *vs.* Croswell, an indictment for a libel upon Thomas Jefferson, President of the United States.

"I.—The liberty of the press consists in the "right to publish *with impunity* truth, with "good motives, for justifiable ends, though "reflecting on government, magistracy or "individuals.

"II.—That the allowance of this right is "essential to the preservation of free govern- "ment—the disallowance of it fatal.

"III.—That its abuse is to be guarded "against by subjecting the exercise of it to the "animadversion and control of the tribunals "of justice; *but that this control cannot safely "be entrusted to a permanent body of magis- "tracy, and requires the effectual co-operation "of Court and jury.*

"IV.—That to confine the jury to the "mere question of publication and the ap- "plication of terms, without the right of "inquiry into the intent or tendency, refer- "ring to the Court the exclusive right of "pronouncing upon the construction, ten- "dency and intent of the alleged libel is "calculated to render nugatory the function "of the jury, enabling the Court to make a "libel of any writing whatsoever, the most "innocent or commendable.

"V.—That it is the general rule of criminal "law, that the intent constitutes the crime, "and that it is equally a general rule that "the intent, mind, or *quo animo*, is an in- "ference of fact to be drawn by the jury.

"VI.—That if there are exceptions to this "rule they are confined in cases in which "not only the principal fact, but its circum- "stances, can be and are defined by statute, "or judicial precedent.

"VII.—That in respect to libel there is no "such specific and precise definition of facts "and circumstances to be found; that con- "sequently it is difficult, if not impossible, "to pronounce that any libel is, *per se* and "exclusive of all circumstances, libellous; "that its libellous character must depend "upon intent and tendency, the one and the "other being matters of fact."

This precise and elegant statement of the law was supported by a luminous argument reviewing the whole law of libel and its history, showing that it was the ancient law, and that Mr. Fox's act was declaratory merely. It received the full assent of Kent, afterwards Chancellor, whose opinion contains a most elaborate scrutiny of the doctrine of Lord Mansfield, and declares that he and the Judges who followed him had "involved "themselves in inconsistency and paradox; "and I am induced to believe that it is a de- "parture from the ancient, simple and true "history of the trial by jury in criminal "cases."

Hamilton's Works (N. Y., 1886), Vol. 7, pp. 333, *et seq.*

People *vs.* Croswell, 3 Johns. Cases, 336, 365.

7. The Alien and Sedition Law of 1798 contained provisions for the punishment of libels against the government which became the subject of violent controversy. These provisions were deemed unconstitutional by many of the most enlightened statesmen, including Madison, the author of the Report of the Virginia House of Delegates. Their unconstitutionality seems to have been conceded in the discussion herein referred to in the U. S. Senate in 1836. But no attempt was made by this statute to define what publications should be punishable so as to restrict the office or the power of a jury. The design simply was to make libels upon the U. S. Government punishable just as libels against the British Government had always been punishable at common law. This could not be done without the aid of an express statute, for the Courts of the United States have no common law jurisdiction in criminal cases (United States *vs.* Hudson, 7 Cr., 33). It could with great plausibility be argued that that government should not remain stripped of power to defend itself against any libel however seditious. And this law proceeded upon a full acknowledgment of the doctrine of the liberty of the press as herein maintained. It sought to lay down no new definition of the law of libel, but made that offense to consist in publications designed and tending to overthrow the government or bring it into contempt, thus making the *intent* an essential element of the crime. And, moreover, it allowed by express provisions, that the truth might be proved by way of

defense; and *clothed the jury with the right to determine both the law and the fact.*

Act of July 14th, 1798. Stat. at Large, Vol. 1, page 596.

IV.—If the foregoing discussion has been in any degree successful, it has established that the phrase "Liberty of the Press," as employed in the First Amendment, imported that measure of liberty which permits, without previous restraint, the publication of any writing whatever, and without the restraint of any *subsequent penalty*, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous.

The immediate purpose and effect of the amendment was to place this great safeguard of liberty beyond the peril of the exercise even of the *legislative* power.

1. The framers of our Constitution did not require to be taught that all safeguards for the protection of rights must be erected against the *possessors of power*, whoever they might be; nor did they fail to perceive that the doing away with a monarch had no effect to destroy, but only to *transfer*, power. It was equally clear to them that in such a division as they proposed of legislative, executive and judicial powers, the Legislature would be the superior body, and encroachments from that quarter were most to be apprehended.

The Federalist, Nos. 48 and 49.

2. It was not from the executive or the judicial departments that they apprehended any invasions of the liberty of the press. They had left the former without any pretense for the exertion of a restraining authority; and the latter, being in no manner bound to, or dependent upon, a permanent or hereditary sovereign, was quite unlikely to become united in any such endeavor. But the case was quite different with the Legislature. Its power would be wielded by a *majority*, which might easily be influenced to the adoption of questionable measures by a belief that its supremacy could thus be perpetuated. Striking directly at this danger, they thus framed their safeguard: "*Congress shall make no law* * * * * * abridging the freedom "of speech, or of the press." This bestowed upon the people of the United States a protection which could not be gained in Great Britain, and constituted the final stage in the security of the liberty of the press.

3. The result of the contest in England was to preclude *Judges*—the fixed and permanent magistracy—from making the question of the guilt or innocence of a publication a question of *law*, and taking it away from the jury by *judicial definitions* of what publications should be deemed libellous. Such definitions, however, may just as well be made by legislative *enactment*. That power Parliament still retained. But the framers of the Constitution went further and forever precluded Congress from making any such *legislative* definitions. Congress, therefore,

cannot *describe* any publication by any narrower description than *seditious, libellous,* or equivalent terms, and declare that the publications so described shall be *deemed to be* seditious, or libellous, and punishable as such.

And a very learned writer is of opinion that under free governments like ours there is no place for any system of repressing libellous publications except when made with intent to incite rebellion or civil war.

Cooley Const. Limitations, 526.

V.—Having determined the import of the term "freedom of the press," as employed in the First Amendment, we are now prepared for the main inquiry whether the statute in question is a law *abridging* that freedom. That such is its character is very clear.

1. That freedom includes not only the liberty of *printing*, but the liberty of *publishing*. The former would be empty indeed without the latter. And the liberty of *publishing* must be co-extensive with the liberty of *printing*. And what is *publishing?* It is the *communication to others* of what is printed; in other words, it is *circulating*. *Publishing* and *circulating* are admitted to be synonymous (*Ex parte* Jackson, 96 U. S., 727). And what was the liberty of *publishing*, which existed at the time of the adoption of the Constitution? It was the liberty of

circulating printed matter in all practicable forms.

2. The case of *ex parte* Jackson (96 U. S., 727), by its reasoning, seems effectually to determine that the statute under notice is invalid upon the ground now asserted. That decision proceeded upon the view that Congress had the right to refuse the facilities of the mails to lottery mattery, but it fully conceded that it could not prohibit the circulation of such matter in other ways (p. 735).

3. It may perhaps be urged that the statute does not apply to printed matter generally relating to lotteries, but only to papers purporting to be, or represent *tickets*, or chances, and to advertisements of lotteries.

But will it be claimed that this prohibition of the carriage of advertisements, which are ordinarily contained in newspapers, is not an invasion of the liberty of the press?

Lastly.—The judgment should be reversed, and a new trial ordered.

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